APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1963

RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

INDIANA & MICHIGAN ELECTRIC COMPANY, *Intervenor*

No. 72-2035

ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

INDIANA & MICHIGAN ELECTRIC COMPANY, *Intervenor*

Petitions for Review of an Order of the Federal Power Commission

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Decided May 25, 1973

Sandra J. Strebel, with whom *George Spiegel* was on the brief, for petitioner in No. 72-1963.

Wallace L. Duncan, with whom *Fredrick D. Palmer* was on the brief, for petitioner in No. 72-2035.

Platt W. Davis, III, Attorney, Federal Power Commission, with whom *Leo E. Forquer,* General Counsel, and *George W. McHenry, Jr.,* Acting Solicitor, Federal Power Commission, were on the brief, for respondent.

Peter J. Schlesinger for intervenor. *Edwin L. Weisl, Jr.* also entered an appearance for intervenor.

Before WRIGHT and ROBB, *Circuit Judges,* and DAVIES*, *Senior District Judge.*

Opinion for the Court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge:* Petitioners in these consolidated cases, two municipal power companies, seek review of an order of the Federal Power Commission accepting for filing tariffs tendered by intervenor, a public utility which sells petitioners electric power at wholesale. Petitioners contend that the tariffs, which implemented a rate increase and changed certain conditions of service, were inconsistent with existing contracts between petitioners and intervenor and therefore should have been rejected by the Commission. We agree and reverse.

I. LEGAL SETTING

The Federal Power Act, 16 U.S.C. § 824 *et seq.* (1970), pertinent provisions of which are set forth in the margin,[1] requires in Section 205(c) that public utilities file

* Of the United States District Court for the District of North Dakota, sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

[1] 16 U.S.C. § 824d(c)—(e) (1970):

"(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commis-

all rates and contracts with the Commission for sales subject to the Commission's jurisdiction. Section 206(a) authorizes the Commission to modify any rate or contract

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sion may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the

which it determines, after a hearing, to be "unjust, unreasonable, unduly discriminatory or preferential * * *." Under Section 205(d) changes in previously filed rates must

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Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

16 U.S.C. § 824e(a) (1970):

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affect[ing] such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

be filed with the Commission at least 30 days before they are to go into effect, and under Section 205(e) the Commission may suspend operation of the new rate for up to five months pending a determination of its reasonableness.

The Supreme Court of the United States has held that if a public utility, subsequent to entering into a contract for the sale of power, unilaterally files with the Commission under Section 205(d) a new tariff inconsistent with its contractual obligations, the newly filed tariff is a nullity and does not abrogate or supersede the contract. *See United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

Mobile concerned provisions of the Natural Gas Act virtually identical with the provisions of the Federal Power Act summarized above. There a regulated natural gas company entered into a 10-year contract to supply natural gas at a single fixed price. Subsequently the company, without the consent of the buyer, filed new schedules with the Commission purporting to increase the rate. The Court held that the new schedule "was a nullity insofar as it purported to change the rate set by [the] contract" and "that the contract rate remained the only lawful rate." 350 U.S. at 347. It reasoned that the Natural Gas Act evidenced no purpose to abrogate private rate contracts, and expressly recognized that rates to particular customers may be set by individual contracts. 350 U.S. at 338. This interpretation of the statutory scheme, according to the Court, did not impair the regulatory powers of the Commission, for the Commission could at any time enter into a proceeding to determine that the contract rate was unreasonable and could modify it if it so found. *See* 350 U.S. at 344-345. The *Sierra* case expressly adopted *Mobile's* reasoning and holding in a similar situation arising under the Federal Power Act.

The *Sierra—Mobile* problem came before the Supreme Court again in *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958). There a regulated gas pipeline company had entered into long-term sale agreements. These agreements, unlike the ones in *Sierra* and *Mobile*, did not provide for a single fixed rate, but provided that "[a]ll gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule • • • *or any effective superseding rate schedules*, on file with the Federal Power Commission." 358 U.S. at 105. (Emphasis by the Court.) The seller filed a new rate schedule purporting to increase rates over the last previously filed schedule. The Court held that the newly filed rate was the effective rate, and distinguished the case from *Mobile*. Interpreting the contract between the parties, the Commission had concluded that the seller "bound itself to furnish gas to these customers during the life of the agreements *not* at a single fixed rate, as in *Mobile*, but at what in effect amounted to its current 'going' rate." 358 U.S. at 110. (Emphasis in original.) The Supreme Court, after scrutinizing the record, concluded that there was ample support for the Commission's interpretation of the contract, both factually and legally. *See* 358 U.S. at 114. The Court therefore held that, rather than seeking unilaterally to abrogate its contractual undertaking, the seller in *Memphis* sought "simply to assert, in accordance with the procedures specified by the Act, rights expressly reserved to it by contract." 358 U.S. at 112. It was therefore concluded that the seller could, *consistent with its contractual undertaking*, unilaterally increase its rate by filing a new tariff with the Commission.

The rule of *Sierra, Mobile* and *Memphis* is refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with con-

tractual obligations are invalid.[2] The two cases before us concern application of this rule to two slightly different contractual undertakings. Although the Commission dealt with both cases in the same order, we will consider them separately because of these differences.

II. RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA

Richmond Power and Light (hereinafter Richmond) is a municipally owned electric power company selling electricity to various retail customers. It generates part of the electric energy it sells and purchases the remainder of its requirements from intervenor Indiana & Michigan Electric Company (hereinafter I & M) pursuant to a 10-year contract dated November 15, 1965.[3] I & M is a public utility subject to the jurisdiction of the Federal Power Commission, *see Indiana & Michigan Electric Co.*, 33 FPC 739 (1965), *affirmed*, 7 Cir., 365 F.2d 180, *cert. denied*, 385 U.S. 972 (1966) and its sales to Richmond are subject to the Commission's jurisdiction. I & M also has retail customers of its own in certain parts of Indiana, including many industrial users, and its sales to these customers are not subject to regulation under the Federal Power Act as the Act applies only "to the sale of electric energy *at wholesale* in interstate commerce * * *."[4] Instead, I & M's sales to its retail customers are subject to the jurisdiction of the Indiana Public Service Commission.

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[2] *See also Portsmouth Gas Co.* v. *FPC*, 101 U.S.App.D.C. 99, 247 F.2d 90 (1957); *Shell Oil Co.* v. *FPC*, 3 Cir., 334 F.2d 1002, 1007 (1964).

[3] Under its terms, the contract went into effect on January 1, 1966 and will expire on January 1, 1976 unless altered by agreement of both parties before that date.

[4] 16 U.S.C. §824(b) (1970) (emphasis added).

Since the Federal Power Commission had jurisdiction over I & M's sale of electricity to Richmond, the contract between I & M and Richmond was filed with the Commission under Section 205(c) of the Act, and was designated Rate Schedule FPC No. 58. As is common practice,[5] the contract between I & M and Richmond does not itself contain a price term, but rather refers to a rate tariff of general applicability. In this case the contract provides that electric energy will be provided "at the rate and under the provisions of Company's [I & M's] Tariff I.P. as regularly filed with the Public Service Commission of Indiana, said tariff being selected by the Customer [Richmond], as long as said tariff is in effect • • •." The Tariff IP referred to in the contract is an industrial tariff that I & M negotiated for many of its municipal power company wholesale buyers as well as for many of its larger industrial retail customers. Tariff IP was on file with the Public Service Commission of Indiana when this contract was negotiated. Pursuant to the terms of the Richmond—I & M contract, the same Tariff IP as was then on file with the Public Service Commission of Indiana was attached to the contract when it was filed with the Federal Power Commission and became a supplement thereto. As a result, I & M's industrial retail customers, whose rates were governed directly by the Tariff IP on file with the Indiana Public Service Commission, and Richmond, whose rates were governed by the contract on file with the Federal Power Commission which expressly incorporated the Tariff IP on file with the Public Service Commission of Indiana, all received electric power subject to the same rate formula.

It is conceded that, consistent with the Richmond—I & M contract, I & M had the right to seek rate increases in the

[5] *See United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Water Division*, 358 U.S. 103, 115 n.8 (1958).

Tariff IP on file with the Indiana Commission. The contract language "Tariff I.P. as regularly filed with the Public Service Commission of Indiana" obviously recognizes this possibility. Indeed, the contract expressly provides "and in the event said tariff is replaced by a new or revised tariff incorporating higher or lower rates than those stipulated in the aforementioned tariff, the Company will continue to furnish service as stipulated in the Agreement and the Customer will pay for such service at the higher or lower rates from and after the date when such rates are made effective." Acting consistently with the contract, then, I & M obtained from the Indiana Public Service Commission approval for a new Tariff IP which went into effect on March 29, 1972, implementing a rate increase of about 10 per cent.[6] Richmond also concedes that at this point, consistent with I & M's contractual obligation, I & M could have filed the new Tariff IP as a superseding supplement to the Richmond—I & M contract on file with the Federal Power Commission. But I & M did not take this step. Instead, it filed with the Federal Power Commission, as a superseding supplement to the Richmond—I & M contract, a Rate Schedule WS which effected a rate increase estimated at 45 per cent and also changed certain conditions of service. Richmond's basic position on this appeal is that I & M's filing of Rate Schedule WS was inconsistent with its contractual undertaking to sell Richmond electricity "at the rate and under the provisions of Company's Tariff I.P. as regularly filed with the Public Service Commission of Indiana * * * as long as said tariff is in effect * * *."[7]

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[6] *See* text at p. 22 *infra*.

[7] Richmond also claims that the filing violated a provision of the contract requiring notice and negotiation of any proposed modifications to the contract. The pertinent provision reads:

"At any time from the date of this Agreement either

On its face Richmond's position appears unassailable. But in its order accepting Rate Schedule WS for filing, and in a subsequent order denying a rehearing, the Federal Power Commission has attempted what may charitably be termed an "end run" around that position; the Commission has made an effort to interpret the Richmond—I & M contract in a way that avoids compliance with the command of the *Mobile—Sierra—Memphis* cases.[8]

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party, by giving not less than ninety days written notice to the other party, may from time to time call for a reconsideration of the terms and conditions of this Agreement, including, but without limiting the generality of the foregoing, any change in the facilities to be provided by the parties and/or the operation of such facilities. If such reconsideration is called for, the authorized representatives of the parties shall meet promptly and discuss any changed conditions not foreseen or reasonably foreseeable at the date of this Agreement or at the conclusion of the next previous reconsideration, if any, and any other factors which might cause any inequities. Any agreement modifying such terms and conditions shall specify the date such modification shall become effective."

I & M argues that changes in the appropriate tariff do not fall within this provision since it applies only to "changed conditions not foreseen or reasonably foreseeable at the date of this Agreement" and the contract admittedly foresees changes in Tariff IP. Since we find that I & M's filing violates the contract in other respects, we need not reach this question of contract interpretation.

[8] The FPC has recently revealed its disagreement with the *Mobile* and *Sierra* decisions. In *Carolina Power and Light Co.*, 47 FPC 1, 4 (1972), the Commission stated:

> "The conclusions expressed by [the presiding examiner] and affirmed by this Opinion and order are, in our judgment, the only conclusions available to us, given the current state of the law as interpreted in *Mobile, Sierra,* and *Memphis.* We feel constrained, however, to express our misgivings with respect to these conclusions and to state that in our judgment

The Commission's analysis of the contract begins with this observation:

> "• • • The contract provisions cited • • • indicate that, at the time the agreements were made, the Public Service Commission of Indiana was regarded as the regulatory body with jurisdiction and that rate changes were contemplated by the order or with the approval of that Commission. This Commission's jurisdiction over I & M's wholesale rates has since been asserted and confirmed, *Indiana & Michigan Electric Company*, 33 FPC 739 (1965), affirmed, 365 F2d 180 (CA 7, 1966), cert. denied, 385 US 972 (1966).• • •"

From this, the Commission argues in its brief that

> "It is inconceivable that the parties intended to establish a rate for sales subject to the jurisdiction of the Federal Power Commission. Indeed, it is more likely that the parties intended that the contracts be subject to the ratemaking authority of the appropriate regulatory body. That organization is now the Federal Power Commission and its rate-changing procedures apply in full."

Brief for respondent at 15-16 (footnote omitted).

The problem with this whole argument is that, as applied to the Richmond—I & M contract, its first premise is factually incorrect. True, there was a time when it was assumed that I & M's sales to Richmond were subject to the jurisdiction of the Indiana Public Service Commission rather than the Federal Power Commission. But the contract between Richmond and I & M was entered into on November 15, 1965, and the Federal Power Commission's

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the *Mobile-Sierra* rule is inconsistent with sound regulatory policy. That rule has the effect of limiting our authority under Section 206(a) of the Federal Power Act. * * *"

The FPC reiterated this position in *Philadelphia Electric Co., Susquehanna Electric Co.*, Docket No. E-7726, Aug. 31, 1972, slip op. at 4.

decision holding that it had jurisdiction over I & M's wholesale transactions had issued on April 15, 1965 after a lengthy investigation and hearing.[9] By July 1965 I & M had already commenced filing its wholesale for resale rate schedules with the Federal Power Commission pursuant to Section 205(c) of the Act.[10] The contract was thus entered into with full knowledge that it was the Federal Power Commission, not the Indiana Public Service Commission, which had ultimate jurisdiction over the transactions covered in the contract.[11]

Richmond has given a most plausible explanation why Richmond and I & M, even though knowing that the Federal Power Commission had ultimate jurisdiction over their contract, agreed that the rate for electricity would be governed by the Tariff IP on file with the Public Service Commission of Indiana. According to Richmond, I & M

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[9] *See Indiana & Michigan Electric Co.*, 33 FPC 739 (1965), *affirmed*, 7 Cir., 365 F.2d 180, *cert. denied*, 385 U.S. 972 (1966).

[10] *Indiana & Michigan Electric Co.*, 35 FPC 298 (1966).

[11] I & M argues that, even though the FPC order assuming jurisdiction over I & M's wholesale transactions had issued in 1965, the matter was still strongly contested on appeal, and it was not until the Supreme Court denied a writ of *certiorari* that the matter was considered settled. I & M contends, therefore, that even when Richmond's contract was negotiated the parties assumed that Indiana law rather than the Federal Power Act governed the contract. We find it hard to believe that sophisticated commercial entities such as I & M and Richmond would rest important long-term contractual obligations upon the hope that a court would reverse the FPC's order. In any event, for the reasons discussed in text *infra* at pp. 17-23, even if the parties both assumed in 1965 that Indiana law governed, we would still be constrained to interpret the contract as barring I & M from effecting changes in rates simply by filing a new tariff with the appropriate regulatory authority.

and Richmond are competitors in certain respects: each tries to attract new industrial retail customers to its service territory and to keep existing industrial retail customers. The Richmond—I & M contract ensures that Richmond receives the same rate that I & M charges its own industrial retail customers. In other words, the contract ensures that Richmond, when it resells power to its industrial retail buyers, will be able to price itself competitively with the retail rates I & M offers to its own industrial customers. Absent such protection, I & M could offer a lower price to its industrial retail customers than Richmond would be able to offer, thereby directing new industries away from Richmond's service territory and into I & M's retail service territory. And because of concerns relating to such matters as employment and the property tax base, Richmond, a municipally owned company, had an interest in encouraging industries to locate in its service territory.[12]

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[12] In this respect the relationship between the parties differs from that in *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division, supra* note 5. There the buyers argued that it would be unreasonable to find that they intended, in signing the contract, to permit the seller to change its rate by unilaterally filing a new tariff. *See* 358 U.S. at 115-116 n.10. The Court disagreed since it appeared, *inter alia,* that the buyers were entitled by contract with their customers to pass on any rate increases effected by the seller. *Ibid.* We may assume that such is the case here, although there is nothing in the record on the matter. This factor is not controlling here, however, since Richmond's alleged interest is not in having the rate remain static, but in having it remain in parity with the rates charged other industrial customers of I & M, thereby ensuring that I & M will not be able to have a competitive advantage in encouraging new industrial loads to locate in its service territory. Richmond thus had an interest in barring unilateral rate increases even if it could pass rate increases on to its customers.

The Commission's order next states that this was not a "fixed-rate" contract under the *Mobile* and *Sierra* cases, as it permitted some change in the rates. Since rate changes were contemplated, the Commission argues, the case is properly controlled by the Supreme Court's decision in *Memphis,* where a unilateral filing was effective to change the rates. But this argument misperceives the rationale of the Court's holdings. Because the wholesale transactions regulated under the Natural Gas Act and the Federal Power Act "require substantial investment in capacity and facilities for the service of a particular distributor," both acts provide for individual arrangements between sellers and wholesale buyers, with the relations between the parties established initially by contract. *See United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* 350 U.S. at 339. By insuring that contractual obligations cannot be circumvented by one party to the contract unilaterally filing with the Commission a new tariff inconsistent with those obligations, the *Mobile—Sierra—Memphis* doctrine "preserv[es] the integrity of contracts" and "permits the stability of supply arrangements which all agree is essential to the health of * * * industry." *Id.* at 344. These principles apply whether the parties agree to a specific rate or whether they agree to a rate changeable in a specific manner. In either case the contract is binding, and a unilateral filing is ineffective to change it. The parties to this particular contract each had certain interests it sought to protect in drafting the provision under discussion. I & M, no doubt, wanted to be able to change its industrial tariff to reflect increased costs, inflation, and so forth. Richmond, in turn, wanted to ensure that it would not be placed in a competitive squeeze with respect to resale to industrial customers. The accommodation reached in the contract serves both these interests by permitting I & M to seek changes in its Tariff IP on file with the Public Service Commission of Indiana, but

requiring that Richmond be served under the same tariff as that used by I & M for its own industrial retail customers. We see no reason why the integrity of this contractual undertaking is any less deserving of protection under the Act than one for a single fixed rate.

In its order denying a rehearing, the Commission adverted to Richmond's argument that the contract represented agreement by I & M that its wholesale rates to Richmond would be the same as I & M's retail rates in its Tariff IP on file with the Indiana Commission. The Federal Power Commission answers:

> "This Commission has exclusive jurisdiction over I&M's wholesale sales to * * * [Richmond], and I&M is obligated to charge those rates which are on file with this Commission. This Commission's jurisdiction cannot be limited or avoided by private contract. * * *"

This response is most troubling, for it shows that the Commission simply does not understand, or more likely is not willing to abide by, the fundamental principle of the *Sierra—Mobile—Memphis* decisions. As the Supreme Court emphasized in *Mobile* in response to similar arguments, "[D]enying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest." 350 U.S. at 344. Thus, in our own case, the Commission always remains free, upon its own motion, to enter into a proceeding under Section 206(a) of the Act to determine whether the contract rate between Richmond and I & M is "unjust, unreasonable, unduly discriminatory or preferential * * *."[13] If it so determines, it can order the rate

[13] The FPC has already entered into one investigation of the rates charged by I & M to its municipally owned wholesale customers.

changed. If the Federal Power Commission believes that the Public Service Commission of Indiana is being niggardly in approving rate increases in Tariff IP, it is free to enter into a proceeding to require Richmond or any other wholesale buyer to pay a higher rate. In summary, the Richmond—I & M contract, like the contracts in *Mobile* and *Sierra*, does not limit the Commission's jurisdiction, for under the Act the Commission has no jurisdiction to change contract rates except after determining, through a proceeding under Section 206(a), that the contract rate is unreasonable.

The Commission's brief argues:

> "• • • If public utilities were prohibited from filing rates believed to be consistent with the Federal Power Act, the company might lose revenues to which it is entitled by statute for the period between the termination of suspension and the Commission's ultimate decision on the just and reasonable rate. • • •"

Brief for respondent at 17. But surely this argument proves too much, for it also cuts against the holding in the *Sierra* case. There, after the seller unilaterally filed its rate increase, the Commission accepted the rate for filing

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See Indiana & Michigan Electric Co., supra note 10. An order approving an offer of settlement, to which all parties agreed, was issued some two years later. *See Indiana & Michigan Electric Co.*, 39 FPC 272 (1968). Under the settlement, each municipal wholesale buyer was given the option of switching from its present tariff to a new Tariff MRS, thereby obtaining a rate reduction. Evidently most municipalities availed themselves of this option, since when I & M tendered its Rate Schedule WS for filing in June 1972 the tender indicates that out of 16 municipal wholesale customers the rates of 12 were governed in June 1972 by Tariff MRS. Notably, Richmond and Anderson were among those municipal buyers that did not take advantage of the option and I & M's June 1972 tender states that their rates were still governed by Tariff IP.

but suspended it for five months pending the outcome of a Section 206(a) proceeding to determine its reasonableness. The Commission ultimately found that the new rate was reasonable (thereby implying that the contract rate was unreasonable), but the order embodying this finding did not issue until some nine months after termination of the five-month suspension. Since the Commission had accepted the new rate for filing, the new rate became the effective rate during this nine-month period. The Court expressly held that the filing should have been rejected, as inconsistent with contractual obligations, and that the Section 206(a) determination "can effect no change prior to the date of the order * * *." 350 U.S. at 353. Thus the Court recognized that the contract rate, even if it was ultimately determined to be unreasonably low, remained the only lawful rate until the date of the Commission's order in the Section 206(a) proceeding. Nor is there anything particularly inequitable about this result, since it was the seller after all who, through arm's length negotiation, entered into the contract in the first place. And, as stated in *Mobile,* this result was simply part of the "reasonable accommodation" afforded by the Act "between the conflicting interests of contract stability on the one hand and public regulation on the other." 350 U.S. at 344.

III. ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA

Anderson Power and Light (hereinafter Anderson) is also a municipally owned electric power company selling electricity to assorted retail customers. Unlike Richmond, it no longer generates any electricity but purchases all of its requirements from I & M pursuant to a long-term agreement. In matters relevant to the issues before us, the Anderson—I & M contract is identical with the Richmond—I & M contract except in two respects. First, and most importantly, the Anderson—I & M contract was en-

tered into on April 17, 1957 at a time when both parties to the contract admittedly assumed that the Public Service Commission of Indiana, not the Federal Power Commission, had ultimate jurisdiction over the contract. In addition, the relevant contract language is slightly different. Whereas the Richmond—I & M contract referred to the "Tariff I.P. as regularly filed with the Public Service Commission of Indiana," the Anderson—I & M contract provides, in pertinent part, that I & M will provide electric energy "at the rate and under the provisions of the regularly filed and published tariff selected by the Customer [Anderson] and known as Tariff I.P. (a copy of which is attached hereto), as long as said tariff is in effect • • •." In other respects the Anderson case is identical with the Richmond case. Here too I & M filed with the Federal Power Commission the new Rate Schedule WS purporting to increase Anderson's rates, and here too Anderson claims that since there is a Tariff IP still in effect before the Indiana Public Service Commission I & M's filing violates its contractual commitment to serve Anderson "at the rate and under the provisions of the regularly filed and published tariff • • • known as Tariff I.P. • • • as long as said tariff is in effect • • •."

We do not believe either of the differences between the Anderson contract and the Richmond contract affects the outcome of the case, though we reach that conclusion through reasoning quite different from that used in the previous section to discredit the Commission's interpretation of the Richmond—I & M contract.

We begin our analysis again by reference to the Commission's order accepting I & M's Rate Schedule WS for filing. After recognizing, correctly in this case, that the contract was entered into at a time when it was assumed the Public Service Commission of Indiana had jurisdiction over the transaction, the order notes "that rate

changes were contemplated by the order or with the approval of that Commission." The order then refers to another recently decided case, concerning another Indiana wholesale power contract, wherein the Commission stated:

> "Our review indicates that when read in their entirety, the subject contracts by their express provisions contemplate changes in the rates and charges for electrical power by or with the approval of the Public Service Commission of Indiana. Since 1965 sales under such contracts have been expressly held to be subject to the jurisdiction of the Federal Power Commission. We therefore find that because the contracts contemplate changes in rates and charges by the appropriate regulatory authority, [the seller] is not precluded from filing for an increase in its filed rates, and the rate filing procedures of Section 205 of the Federal Power Act are applicable to this proceeding. The *Sierra* and *Mobile* cases, *supra*, do not therefore apply. *United Gas Pipeline Company* v. *Memphis Light, Gas and Water Division, et al.*, 358 U.S. 103, (1958). We shall therefore deny the motions [to reject the filing]." [14]

The Commission seems to be saying that it is simply interpreting the contract, in light of changed circumstances, to accomplish what the parties intended. And we have no quarrel in principle with this approach to contract interpretation.[15] But the Commission's analysis of what the parties intended in this instance, and its attempt to fit this case within the *Memphis* mold, will not stand scrutiny. The Commission says that the parties contem-

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[14] *Public Service Co. of Indiana, Inc.*, —— FPC ——, —— (Docket No. E-7645, Feb. 25, 1972) (slip op. at 2) (footnote omitted).

[15] *See W. C. Shepherd Co.* v. *Royal Indemnity Co.*, 5 Cir., 192 F.2d 710, 715 (1951); *Pacific Portland Cement Co.* v. *Food Machinery & Chemical Corp.*, 9 Cir., 178 F.2d 541, 551-553 (1949); RESTATEMENT OF CONTRACTS § 235, Comment *e* & Illustration 8, at 324-325 (1932).

plated rate changes "by the order or with the approval of" the appropriate regulatory commission. This may well be true, but it is beside the point. The issue under *Memphis* is not whether the parties contemplated change by the appropriate regulatory authority, for under the law every electric power contract must contemplate such change. Instead, the question is whether the parties contemplated that the seller could unilaterally effect a change in the rate simply by filing a new tariff with the appropriate regulatory agency.[16] And if we begin with the Commission's observation that the parties to the Anderson—I & M contract contemplated that Indiana law rather than the Federal Power Act governed their contract, we can see that the parties never contemplated anything of the sort.

Under Indiana law no change can be made in any public utility rate schedule except upon approval by the Public Service Commission of Indiana.[17] A public utility may file a petition requesting an increase in its own rate,[18] and

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[16] *See United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division, supra* note 5, 358 U.S. at 110.

[17] Change of rates, how made.—No change shall thereafter be made in any schedule, including schedules of joint rates, except upon thirty [30] days' notice to the commission *and approval by the commission* and all such changes shall be plainly indicated upon existing schedules or by filing new schedules in lieu thereof thirty [30] days prior to the time the same are to take effect * * *.

10 BURNS IND. STAT. ANN. § 54-317 (1951 Replacement Vol.) (emphasis added).

[18] Complaint by public utility.—Any public utility may make complaint as to any matter affecting its own rates or service with like effect as though made by any mercantile, agricultural or manufacturing society, body politic or municipal organization or by any ten [10] persons, firms, corporations or associations. Whenever any public utility shall file

the Commission must then proceed with an investigation into the lawfulness of the rates.[19] But no order affecting the rates can be entered by the Commission without a formal public hearing,[20] and no rate change is effected until there is an order by the Commission approving the increase.[21] In other words, no rate could be increased under

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a complaint or petition as to any matter concerning an increase of its own rates, affecting its patrons in any county in which such public utility renders service, the public utility shall publish a notice of the filing of such petition or complaint in a newspaper of general circulation published in such county.

10 BURNS IND. STAT. ANN. § 54-415 (1972 Cum. Pocket Supp.).

[19] Complaints—Investigation and hearing.—Upon a complaint made against any public utility by any mercantile, agricultural or manufacturing society or by any body politic or municipal organization or by ten [10] persons, firms, corporations or associations, or ten [10] complainants of all or any of the aforementioned classes, or by any public utility, that any of the rates, tolls, charges or schedules or any joint rate or rates in which such petitioner is directly interested are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act whatsoever affecting or relating to the service of any public utility, or any service in connection therewith, is in any respect unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or can not be obtained, the commission shall proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, measurements, practice or act, complained of, shall be entered by the commission without a formal public hearing.

10 BURNS IND. STAT. ANN. § 54-408 (1951 Replacement Vol.).

[20] *See* note 19 *supra*.

[21] *See* notes 17 & 19 *supra*.

Indiana law without going through a procedure similar in many respects to the procedure established in Section 206 (a) of the Federal Power Act. The mere act of filing a rate increase did not effect a rate increase under Indiana law. There had to be affirmative approval of the increase by the Public Service Commission, after an investigation and a hearing. Indeed, in the instant case when I & M sought a 10 per cent increase in Tariff IP before the Public Service Commission these procedural requirements apparently were followed. I & M filed an application with the Public Service Commission to increase its rates in July 1971. The matter came on for a hearing before the Public Service Commission in January 1972. On March 24, 1972 the Commission approved the rate increase by order. Only then was it permitted to take effect.

We think that if one is to construe the Anderson—I & M contract, in light of changed circumstances, to reflect as nearly as one can the intentions of the parties to the contract, the only possible result is to construe it as not permitting I & M to change the rate simply by filing a new tariff with the Federal Power Commission. This case, then, is critically different from *Memphis,* where it was evident that the parties to the contract contemplated that the seller could unilaterally change the rate by filing a superseding tariff with the Commission. *See* 358 U.S. at 105, 114-115, & n.9. *See also Pacific Natural Gas Co.* v. *FPC,* 9 Cir., 276 F.2d 350, 351 (1960).

The obvious truth of the matter is that Anderson, like Richmond, intended to key its rates to those charged by I & M to its own industrial customers in order to protect itself against the same competitive squeeze that concerned Richmond. Any uncertainties one might have as to what the contracting parties intended are set to rest by the fact that in 1969, some four years after it had become clear that the Federal Power Commission was the appropriate

regulatory body, I & M tendered to Anderson for its approval a new contract which provided, in terms identical with the Richmond—I & M contract, that electricity would be furnished "at the rate and under the provisions of Company's Tariff I.P. as regularly filed with the Public Service Commission of Indiana * * *."[22]

The parties to both the Richmond and the Anderson contracts intended that the municipal buyers receive electricity under the same tariff that governed I & M's industrial retail customers. While they contemplated changes in Tariff IP, they never contemplated that those changes could be effected merely by I & M's filing a new tariff. As a result, I & M's filing of Rate Schedule WS as a superseding supplement to both contracts was inconsistent with its contractual obligations and those filings should have been rejected. Accordingly, we remand these cases to the Commission with directions to reject I & M's filings and to initiate such proceedings as may be necessary to secure refunds of the incremental amounts paid by Richmond and Anderson to I & M since the time Rate Schedule WS was erroneously allowed to become effective.

So ordered.

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[22] Reply brief of Petitioner Anderson Power and Light, Exhibit A-1, at 3-a. Anderson never approved the tendered contract and it is therefore not binding as such. It is indicative, however, of the intentions of the parties to the 1957 agreement, as manifested in subsequent conduct. *See generally* S. WILLISTON, CONTRACTS § 723 (3d ed. 1961). *See also* RESTATEMENT OF CONTRACTS, *supra* note 15, § 235(e). *Cf.* note 13 *supra.*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1963—September Term, 1972

Filed May 25, 1973

RICHMOND POWER AND LIGHT OF THE CITY OF RICHMOND, INDIANA,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

INDIANA AND MICHIGAN ELECTRIC COMPANY,
Intervenor.

No. 72-2035

ANDERSON POWER AND LIGHT OF THE CITY OF ANDERSON, INDIANA,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

INDIANA AND MICHIGAN ELECTRIC COMPANY,
Intervenor.

Petitions for Review of an Order of the Federal Power Commission

Before: WRIGHT and ROBB, Circuit Judges, and DAVIES,* United States Senior District Judge for the District of North Dakota.

* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

JUDGMENT

These causes came on to be heard on the petitions for review of an order of the Federal Power Commission and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that these cases are hereby remanded to the Federal Power Commission in accordance with the opinion of this Court filed herein this date.

Per Curiam For the Court

HUGH E. KLINE
Clerk

Date: May 25, 1973

Opinion for the Court filed by Circuit Judge Wright.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 72-1963—September Term, 1972

Filed June 21, 1973

Richmond Power and Light of the City of Richmond, Indiana,

Petitioner,

v.

Federal Power Commission,

Respondent,

Indiana and Michigan Electric Co.,

Intervenor.

No. 72-2035

Anderson Power and Light of the City of Anderson, Indiana,

Petitioner,

v.

Federal Power Commission,

Respondent,

Indiana and Michigan Electric Co.,

Intervenor.

Before: Wright and Robb, Circuit Judges; Davies*, Senior United States District Judge for the District of North Dakota.

* Sitting by designation pursuant to Title 28 U.S. Code Section 292(c).

ORDER

On consideration of intervenor's petition for rehearing, it is

ORDERED by the Court that intervenor's aforesaid petition is denied.

Per Curiam For the Court:

HUGH E. KLINE
Clerk

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: JOHN N. NASSIKAS, Chairman; ALBERT B. BROOKE, JR., and PINKNEY WALKER.

INDIANA & MICHIGAN ELECTRIC COMPANY
Docket No. E-7740

Order Accepting for Filing and Suspending Revised Tariff Sheets, Denying Motions to Reject Filing, Providing for Hearing, Establishing Procedures, Permitting Interventions, Denying Waiver, and Fixing Effective Date

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(Issued August 11, 1972)

Indiana & Michigan Electric Company (I & M) on June 13, 1972, tendered for filing the following tariff changes,[1] each of which was proposed to become effective on July 14, 1972:

(1) First revised sheets No. 7 to 11-3 to the Company's FPC Electric Tariff MRS, under which twelve municipal customers are being served;

(2) Supplements to four rate schedules under which four municipal customers are being served;

(3) Supplements to eight rate schedules under which seven rural electric cooperative customers are being served; and

(4) New FPC Electric Tariff WS, Original Volume No. 1, of the Company.

The proposed changes would increase I & M's revenues from jurisdictional sales and service by approximately

1. See designations in the appendix to this order.

$6,180,000 annually based on the 12-month period ending December 31, 1971, as adjusted. I & M stated that the rate increase is necessitated primarily by the fact that at March 31, 1972, I & M's earnings were insufficient to permit the company to issue any additional long term debt to finance its construction program.

Notice of I & M's proposed changes was issued on June 23, 1972, and was published on June 30, 1972, 37 F.R. 12998. The notice required protests and petitions to intervene to be filed by July 5, 1972. By notice issued July 3, 1972, the date was extended until July 15, 1972, upon the request of Indiana Municipal Electric Association.

A protest against I & M's proposed changes was filed on June 28, 1972, by Coalition for the Environment, Inc., Fort Wayne, Indiana. A letter on behalf of the City of Bluffton, Indiana, in opposition to the proposed rate increase was also received. A letter in protest was received from the Honorable Birch Bayh, United States Senate, on August 7, 1972. Protests and petitions to intervene were filed by the City of Fort Wayne, Indiana, and by the City of Anderson, Indiana,[2] on July 3, 1972, and by a group of municipally-owned electric distributor customers[3] of I & M together

[2] On August 2, 1972, the City of Anderson filed a document entitled "Supplemental Petition to Intervene, Formal Protest and Request for Rejection of Rate Schedules Submitted for Filing" alleging (1) that the proposed tariff changes are discriminatory, (2) that they are not permitted by the City's contract with I & M and should be rejected, and (3) that they should be suspended for five months and a hearing held.

[3] Auburn, Indiana; Avilla, Indiana; Bluffton, Indiana; Columbia City, Indiana; Frankton, Indiana; Garrett, Indiana; Gas City, Indiana; Mishawaka, Indiana; New Carlisle, Indiana; Niles, Michigan; South Haven, Michigan; Sturgis, Michigan; Warren, Michigan.

with the Indiana and Michigan Municipal Distributors Association[4] on July 10, 1972.

Richmond Power and Light of the City of Richmond, Indiana (RP & L)[5] filed on July 3, 1972, a document entitled Protest, Motion to Reject, or, in the Alternative, Request for Hearing and Maximum Suspension Period. RP & L moves to reject I & M's filing on the grounds that it is discriminatory and is contrary to antitrust and other policies and that it violates contracts filed with and approved by the Public Service Commission of Indiana. RP & L also states that the proposed WS Tariff makes no provision for interchange of energy and that

> • • • the Commission pursuant to Section 202(b) of the Federal Power Act should order an interchange agreement between RP & L and I & M similar to that between Gainesville Utility Department and Florida Power Corporation (Protest, pp. 2-3).

RP & L further states that I & M is not permitted by contract to request an effective date prior to final approval of the proposed rate increase by the Public Service Commission of Indiana. In its alternative request, RP & L asks that I & M's proposed tariff changes be suspended for five months and that if a final order is not issued by the end of the five-month period, I & M be ordered to charge for electric service at no more than the rates prescribed by the company's IP Tariff, as approved by the Public Service Commission of Indiana. RP & L adds that Section 205(e)

[4] This is an *ad hoc* association of the group of 13 municipal customers and the Cities of Richmond, Indiana; Fort Wayne, Indiana; and Anderson, Indiana (Cities). This Association also filed on August 7, 1972, a Motion for Suspension of Proposed Rate Increase, alleging that regulations of the Price Commisison require the maximum five months' suspension of I & M's proposed rate increase.

[5] RP & L also filed on August 4, 1972, a telegram reiterating its position, and on August 7, 1972, a "Supplement to Motion to Reject Rate Schedule Filing."

of the Federal Power Act requires suspension for five months unless a final order is issued sooner.

A group of rural electric cooperative customers[6] (Cooperatives) of I & M filed on July 17, 1972, a Protest and Petition to Intervene and for Rejection of Rate Schedules Submitted for Filing. The Cooperatives ask that I & M's filing be rejected on the grounds that it is not permitted by I & M's contracts with them and that the amount of the increase to the Cooperatives exceeds any permissible amount under the economic stabilization program. The Cooperatives rely on *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 US 332 (1956) and *FPC* v. *Sierra Pacific Power Co.*, 350 US 348 (1956) and on the following contract provisions to sustain their first ground:

Article 3B

> Customer agrees to take and pay for the electric capacity and energy delivered to Customer by Company hereunder in accordance with the provisions of Company's Tariff REMC as filed with the Public Service Commission of Indiana, a copy of which tariff is attached hereto as Exhibit A and is hereby made a part of this agreement.

Article 12

> Firm Agreement As to Rates And Charges: Should any change in the rate provided for in ARTICLE 3 hereof be ordered by the Public Service Commission of Indiana, payment for services by Customer to Company as provided for in ARTICLE 3 hereof shall thereafter be made upon the basis of such new rate

[6] Indiana Statewide Rural Electric Cooperative, Inc., Fruit Belt Electric Cooperative, Jay County Rural Electric Membership Corporation, Noble County Rural Electric Membership Corporation, Paulding-Putnam Electric Cooperative, Inc., United Rural Electric Membership Corporation, Wayne County Rural Electric Membership Corporation, and Whitley County Rural Electric Membership Corporation.

as changed and approved by the Public Service Commission of Indiana, provided, however, that in the event of such change in rate, either of the parties hereto shall have the right within a period of ninety days, beginning on the date when such change is ordered by the Public Service Commission of Indiana, to terminate this Agreement by giving to the other party at least sixty days prior notice in writing of its intention so to do.

Company agrees that, in the event the rates, terms or conditions of this agreement are questioned or litigated by others than the parties hereto, including but not limited to Public Officials, Company will jointly and in cooperation with Customer defend the same before any regulatory body or court.

Article 13

After the expiration of said initial term, this Agreement will be renewed automatically for successive renewal periods of two (2) years thereafter, unless written notice of termination is given by either party to the other at least 36 months prior to the expiration of the initial term or any renewal period.

The Cooperatives protest the proposed rate increase on the grounds that it would produce an unreasonable rate of return to I & M and would have unfavorable consequences for the Cooperatives, including possible anticompetitive effects.

On July 18, 1972, I & M filed answers to the pleadings of the Cities. I & M does not oppose permitting them to intervene. I & M does oppose their requests for five-months' suspension of the proposed tariff changes. I & M denies that any of the matters alleged in RP & L's pleading establish any basis for granting RP & L's request to reject the proposed rate schedules.

On August 2, 1972, I & M filed an answer to the Cooperatives' protest and petition. I & M opposes the Cooperatives'

petition for rejection of the proposed rate schedules on the ground that Article 12 of the contracts[7] shows that the parties expressly contemplated and provided for changes in rates. I & M states that the Cooperatives fail to allege any facts or contentions sufficient to warrant suspension of the proposed rates for the maximum period of five months. I & M does not oppose permitting the Cooperatives to intervene in this proceeding.

On July 18, 1972, I & M filed an application for an order fixing July 14, 1972, as the effective date of its proposed rate schedules. The application requests relief, in effect, from a July 3, 1972, letter of the Secretary of the Commission acknowledging I & M's filing and advising the company that:

> The earliest effective date for the increase consistent with [Section 35.13(b)(4)(i)] of the Regulations would be August 13, 1972.

Section 35.13(b)(4)(i) of the Commission's Regulations Under the Federal Power Act requires applicants for rate increases to submit certain data 60 days in advance of the proposed effective date. I & M's tender was made 31 days prior to the proposed effective date of July 14, 1972. The application states that this 60-day filing requirement is unreasonable and unnecessary under the circumstances and that, in any event, it should be waived pursuant to Section 35.11 of the Regulations. The Commission staff responded on July 28, 1972, and suggested that the 60-day filing requirement may be improper because (1) both the Federal

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[7] I & M's answer also quotes the following from Section 6 of the "Other Terms and Conditions" portion of tariff REMC attached to the contracts:

> G. Service shall be furnished and taken under the Company's general rules and regulations on file with the Commission, except to the extent, if any, that the same are expressly modified by the terms and conditions hereinabove provided.

Power Act and the Natural Gas Act require only 30-days' notice of rate changes and (2) it operates in effect as an extension of the statutory provisions for five-months' suspension and 30-days' notice of rate changes (See Section 205(e) and 205(d) of the Federal Power Act, respectively). A response in opposition to I & M's application was filed by the City of Anderson, Indiana, on August 1, 1972, and by RP & L on August 7, 1972.

On August 2, 1972, the Indiana and Michigan Municipal Distributors Association filed a Response to Application for Fixing of Effective Date of Increase. This pleading prays that August 14, 1972, be regarded as the proposed effective date of I & M's tariff changes and that they be suspended for five months. The Association also asks that a phased proceeding be instituted, with the first phase directed to I & M's adjustment to fuel and power costs and the second phase directed to all other issues. This request will be denied because the issues involved in this proceeding are not clearly separable and because phasing this proceeding would impede the most expeditious disposition of it.

The Cooperatives, RP & L, and the City of Anderson, Indiana, have requested that the rate schedules filed by I & M applicable to them be rejected on the ground that the rate changes proposed by I & M are not permitted by their contracts. This Commission does have authority to reject tariff changes which are not permitted by contract, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 US 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 US 348 (1956). The contract provisions cited by the Cooperatives and I & M indicate that, at the time the agreements were made, the Public Service Commission of Indiana was regarded as the regulatory body with jurisdiction and that rate changes were contemplated by the order or with the approval of that Commission. This Commission's jurisdiction over I & M's wholesale rates has since been asserted and confirmed, *Indiana & Michigan Electric Company*,

33 FPC 739 (1965), affirmed, 365 F.2d 180 (CA 7, 1966), cert. denied, 385 US 972 (1966). For the reasons discussed in *Public Service Company of Indiana, Inc.*, Docket No. E-7645 (orders issued February 25, 1972, and May 25, 1972), petition for review filed, *Indiana Statewide Rural Cooperative, Inc.*, v. *FPC*, CADC No. 72-1696, involving similar facts, we find that I & M's contracts with the Cooperatives are not fixed-rate contracts and that I & M's changes applicable to the Cooperatives should not be rejected as contractually barred, *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 US 103 (1958).

RP & L's request that I & M's tariff changes applicable to it be rejected will also be denied. The approval of the Public Service Commission of Indiana is not a prerequisite to the tendered tariff changes by I & M because that Commission does not have jurisdiction. None of RP & L's other allegations are cause for rejection.

The City of Anderson requests rejection of I & M's Rate Schedule WS on the ground that Anderson's 1957 contract with I & M provides for Anderson to be served under Tariff IP as long as Tariff IP is in effect and that Anderson has not agreed to take service under any other schedule. I & M's Tariff IP is applicable to I & M's industrial customers and is therefore on file with the Public Service Commission of Indiana. Tariff IP is also applicable to Anderson, RP & L, and other customers taking service subject to this Commission's jurisdiction and is therefore on file as a contract with this Commission. Neither Anderson nor RP & L alleges that a fixed-rate contract exists. We find that I & M is not precluded from filing the changes in rates, terms and conditions of service as embodied in Rate Schedule WS.

In justifying a proposed effective date 31 days after filing, I & M alleges that increased revenues are necessary

to improve its interest coverage and to permit the issuance of long-term debt. We find that good cause has not been shown for waiver of the 60-day filing requirement of the Regulations. The proposed rates and charges, furthermore, have not been shown to be justified and may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful. It has also been alleged that I & M's proposed tariff changes are contrary to the economic stabilization program and antitrust policies and that interchange of energy should be provided for. It is necessary and appropriate in the public interest and in carrying out the provisions of the Federal Power Act that the Commission enter upon a hearing concerning the lawfulness of the rates, charges, classifications, services, and other provisions contained in I & M's proposed FPC Electric Tariff, and the use thereof deferred as hereinafter provided. I & M's proposed tariff changes will be suspended for five months beginning August 13, 1972, and will become effective subject to refund on January 13, 1973.

The Commission orders:

(A) Pursuant to the authority of the Federal Power Act, the Commission's Rules of Practice and Procedure, and the Regulations under the Federal Power Act, a public hearing shall be held concerning the lawfulness of the rates, charges, classifications, services, and other provisions contained in Indiana & Michigan Electric Company's proposed FPC Electric Tariff and shall commence with a prehearing conference to be held on November 23, 1972.

(B) I & M's application and request for waiver are denied.

(C) Pending such hearing and decision thereon, I & M's proposed tariff sheets are accepted for filing and are suspended and their use deferred until January 13, 1973.

(D) All motions and petitions to reject I & M's filing are denied.

(E) The request of Indiana and Michigan Municipal Distributors Association for phased proceedings is denied.

(F) The above-named petitioners are hereby permitted to intervene in this proceeding subject to the rules and regulations of the Commission: *Provided, however,* that the participation of such intervenors shall be limited to matters affecting rights and interests specifically set forth in their respective petitions to intervene; and *Provided, further,* that the admission of such intervenors shall not be construed as recognition by the Commission that they, or any of them, might be aggrieved because of any order or orders issued by the Commission in this proceeding.

(G) The Chief Examiner or any other designated by him for that purpose (See Delegation of Authority, 18 CFR 3.5 (d)) shall preside at the hearing in these proceedings and shall prescribe relevant procedural matters not herein provided.

(H) At the prehearing conference the direct evidence of I & M and the Commission staff shall be copied into the transcript, subject to appropriate motions, if any, by the parties to the proceeding, and procedures adopted for an orderly and expeditious hearing. On or before November 14, 1972, the Commission staff shall serve its prepared testimony and exhibits, if any. The prepared testimony and exhibits, if any, of intervenors shall be served on or before December 1, 1972. Rebuttal evidence, if any, of I & M shall be served on or before December 15, 1972. Cross-examination of the evidence filed shall commence at 10:00 A.M, on January 2, 1973, in a hearing room of the Federal Power Commission.

By the Commission.

(SEAL)

MARY B. KIDD,
Acting Secretary.

APPENDIX

Indiana & Michigan Electric Company
Rate Schedule Designations

Filing Date: June 13, 1972
Date of Instruments: June 13, 1972

Designations	*Customers*
First Revised Sheets Nos. 7 through 11, Original Sheets Nos. 8-1, 11-1, 11-2, 11-3 to FPC Electric Tariff Original Volume No. 1 (Supersedes Original Sheets No. 7 through 11)	Municipal customers served under tariff
Supplement No. 8 to Rate Schedule FPC No. 27 (Supersedes Exhibit A and Supplement Nos. 5, 6, and 7)	City of Anderson
Supplement No. 6 to Rate Schedule FPC No. 29 (Supersedes Exhibit A and Supplement Nos. 2, 3, and 4)	City of Auburn
Supplement No. 3 to Rate Schedule FPC No. 44A (Supersedes Exhibit A and Supplement No. 1)	United REMC (Rural Electric Membership Corporation)
Supplement No. 3 to Rate Schedule FPC No. 44B (Supersedes Exhibit A and Supplement No. 1)	United REMC
Supplement No. 2 to Rate Schedule FPC No. 46 (Supersedes Supplement No. 1)	Fruit Belt Electric Cooperative
Supplement No. 2 to Rate Schedule FPC No. 48 (Supersedes Exhibit A and Supplement No. 1)	Jay County REMC
Supplement No. 2 to Rate Schedule FPC No. 50 (Supersedes Exhibit A and Supplement No. 1)	Noble County REMC
Supplement No. 2 to Rate Schedule FPC No. 52 (Supersedes Exhibit A and Supplement No. 1)	Paulding-Putnam Electric Cooperative
Supplement No. 2 to Rate Schedule FPC No. 54 (Supersedes Exhibit A and Supplement No. 1)	Wayne County REMC
Supplement No. 2 to Rate Schedule FPC No. 56 (Supersedes Exhibit A and Supplement No. 1)	Whitley County REMC
Supplement No. 5 to Rate Schedule FPC No. 58 (Supersedes Exhibit A and Supplement Nos. 2, 3, and 4)	City of Richmond
Supplement No. 5 to Rate Schedule FPC No. 61 (Supersedes Supplements Nos. 1, 2, 3 and 4)	City of Fort Wayne
FPC Electric Tariff Original Volume No. II	Available to all of above-indicated customers.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: JOHN N. NASSIKAS, Chairman; ALBERT B. BROOKE, JR., PINKNEY WALKER, and RUSH MOODY, JR.

INDIANA & MICHIGAN ELECTRIC COMPANY
Docket No. E-7740

Order Denying Rehearing, Request for Oral Argument, Request for Rejection of Rate Filing, and Motion to Reject Supplementary Pleading

(Issued October 6, 1972)

On August 11, 1972, our "Order Accepting for Filing and Suspending Revised Tariff Sheets, Denying Motions to Reject Filing, Providing for Hearing, Establishing Procedures, Permitting Interventions, Denying Waiver, and Fixing Effective Date" was issued in this proceeding. Applications for rehearing were filed by the City of Anderson, Indiana (Anderson) on September 8, 1972, and by Indiana & Michigan Electric Company (I&M), Richmond Power and Light of the City of Richmond, Indiana (RP&L) and a group [1] of cooperative customers (Cooperatives) of I&M on September 11, 1972.

Anderson and RP&L urge that I&M's filing applicable to them should be rejected on the ground that I&M is obligated to serve them under Tariff I.P. as long as it is in effect. Anderson relies on the following contract language, which is nearly identical to that relied on by RP&L:

> The customer hereby agrees to pay the Company monthly for electric energy delivered hereunder at

[1] Indiana Statewide Rural Electric Cooperative, Inc., Fruit Belt Electric Cooperative, Jay County Rural Electric Membership Corporation, Noble County Rural Electric Membership Corporation, Paulding-Putnam Electric Cooperative, Inc., United Rural Electric Membership Corporation, Wayne County Rural Electric Membership Corporation, and Whitley County Rural Electric Membership Corporation.

> the rate and under the provisions of the regularly filed and published tariff selected by the Customer and known as Tariff I.P. * * * as long as said tariff is in effect; and in the event said tariff is replaced by a new tariff incorporating higher or lower rates than those stipulated herein, the Company will continue to furnish service as stipulated in the contract and the customer will pay for such service at the higher or lower rates from and after the date when such rates are made effective.

Rate Schedule WS containing increased rates was tendered to supersede Tariff I.P. in I&M's rate schedules applicable to service to Anderson and RP&L. RP&L argues further that this contract language represents agreement by I&M that its wholesale rates to RP&L would be the same as I&M's retail rates in its Tariff I.P. on file with the Indiana Public Service Commission.

This Commission has exclusive jurisdiction over I&M's wholesale sales to Anderson and RP&L, and I&M is obligated to charge those rates which are on file with this Commission. This Commission's jurisdiction cannot be limited or avoided by private contract. *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *FPC* v. *Amerada Petroleum Corporation*, 379 U.S. 687 (1965); *J. M. Huber Corp.* v. *FPC*, 236 F.2d 550 (CA3, 1956), cert. denied, 352 U.S. 971 (1957). For service subject to this Commission's jurisdiction, the Tariff I.P. on file with the Indiana Public Service Commission is not applicable. We find that the contracts do not preclude the filing of Rate Schedule WS to supersede Tariff I.P. on file with this Commission.

R P & L also repeats its argument that I & M's filing should be rejected because I & M did not give 90 days' written notice and meet with R P & L to discuss the proposed changes as required by their contract. This ground does not justify rejection because it does not render I & M's

filing either "* * * deficient in form or a substantive nullity," *Municipal Light Boards of Reading and Wakefield, Massachusetts* v. *FPC*, 450 F.2d 1341, 1345 (CADC 1971), cert. denied, 405 U.S. 989 (1972). The applications of Anderson and R P & L for rehearing will be denied.

The Cooperatives request rehearing with oral argument and rejection of the proposed rate schedules applicable to them. Their application for rehearing repeats the arguments for rejection which were fully considered in our August 11 order and attacks our orders in *Public Service Company of Indiana, Inc.*, Docket No. E-7645, appeal pending, *Indiana Statewide Rural Electric Cooperative, Inc.* v. *FPC*, CADC No. 72-1696. The Cooperatives imply that denial of their motion for rejection was based solely on the previous orders in Docket No. E-7645. On the contrary, we ruled on the merits of the Cooperatives' contentions in this proceeding and merely referred to the rationale of the previous orders. The Cooperatives dwell nevertheless on Docket No. E-7645 and draw a distinction between that case and this one on the basis of the following language from Article 12 of their contracts:

> Company agrees that, in the event the rates, terms or conditions of this agreement are questioned or litigated by *others than the parties hereto*, including but not limited to Public Officials, Company will jointly and in cooperation with Customer defend the same before any regulatory body or court. (emphasis added)

Since I & M is a party to the contracts, this language obviously does not have the effect of precluding I & M from proposing rate changes. The Cooperatives' application and, since the Cooperatives' arguments have been adequately briefed and fully considered, their request for oral argument will be denied.

I & M asserts that the Commission has no authority to require a notice in excess of the thirty days specified in Section 205(d) of the Federal Power Act. By Section 35.13(b)(4)(i) of its Regulations issued under Section 309 of the Federal Power Act, the Commission requires the filing of cost of service data 60 days prior to the proposed effective date of increased rates. The rate schedule setting forth the increased rates need only be filed 30 days prior to the proposed effective date. Section 35.2, 35.3 and 35.13 (a), Regulations under the Federal Power Act.

As set forth in *Municipal Light Boards* v. *FPC, supra* at 1354, the 60 day regulation is reasonable and is "designed to enhance the ability of the FPC Staff to make the important threshold decision expeditiously upon the filing of the later statutory 30-day notice, as to whether to order an investigation and hearing or a suspension, or both."

Moreover, I&M's reading of Section 205(d) of the Federal Power Act gives the same meaning to two separate sentences of that section, by asserting that both provisions permit the Commission only to fix a shorter notice period. Section 205(d) reads as follows:

> Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect

and the manner in which they shall be filed and published.

In order to give meaning to all parts of the Section, since the last sentence gives the Commission power to permit less than 30 days notice, the provision in the first sentence properly should be interpreted to permit the Commission in appropriate circumstances to require the filing of requisite data more than 30 days prior to the proposed effective date.

If the Commission has authority to require filing of certain data 60 days prior to the proposed effective date, a suspension of the increased rates for five months thereafter is obviously consistent with Section 205(e) of the Federal Power Act.

In arguing that no regulatory or administrative consideration justifies denial of its request, I&M proposes that rate increase filings be permitted 30 days before the proposed effective date and that any suspension order be issued up to 60 days after the filing date with the suspension period running from the proposed effective date. This proposal is unworkable because the Commission does not have statutory authority to issue a suspension order after a proper proposed effective date. I&M's proposed effective date of July 14, 1972, was improper because it was not 60 days after the filing date of June 13, 1972, and adequate review of I&M's filing by the staff necessitated the full 60-day period.

On September 25, 1972, a "Supplement to Petition of the City of Fort Wayne, Indiana, For Leave to Intervene" was filed. This supplementary petition alleges that I&M is engaged in anti-competitive practices and violations of antitrust laws and specifically that I&M's proposed increased rates have these effects because I&M's retail rates in the vicinity of Fort Wayne are lower. Fort Wayne

requests that I&M's filing applicable to it be rejected. On October 3, 1972, I&M filed a motion for the Commission to reject or refuse to permit Fort Wayne's supplementary petition. Fort Wayne's pleading is actually in the nature of a motion, and we find that it does not state good cause for rejection of I&M's rate filing. We will deny the relief requested by Fort Wayne and I&M's motion.

The Commission further finds:

The grounds for rehearing set forth in the foregoing applications for rehearing present no new facts or principles of law which were not considered in our order of August 11, 1972, or which having now been considered warrant any change or modification of that order.

The Commission orders:

(A) The applications for rehearing filed herein and request for oral argument are denied.

(B) I&M's motion to reject Fort Wayne's "Supplement to Petition for Leave to Intervene" is denied.

(C) Fort Wayne's request that I&M's rate increase filing be rejected is denied.

By the Commission. COMMISSIONER MOODY DISSENTING FILED A SEPARATE STATEMENT APPENDED HERETO.

(SEAL)

KENNETH F. PLUMB,
Secretary.

INDIANA & MICHIGAN ELECTRIC COMPANY
Docket No. E-7740
(Issued October 6, 1972)

MOODY, Commissioner, Dissenting:

On June 13, 1972, Indiana & Michigan Electric Company (I & M) filed proposed rates increasing charges to its wholesale customers. I & M requested an effective date of July 14, 1972, and was advised by our Secretary that pursuant to the 60-day notice provision of Section 35.13(b)(4)(i) of the Regulations, the earliest possible effective date of the proposed rates was August 13, 1972. In response, I & M filed an application requesting either (i) an effective day of July 14, 1972, or (ii) that July 14, 1972, be set as the date from which any suspension of I & M's proposed rates would commence. On August 11, 1972, twenty-eight days after I & M's proposed effective date, the Commission issued an order suspending I & M's proposed rates for five months, with the suspension period commencing on August 13, 1972. In my opinion, that order when issued was, and continues to be, a nullity.

Once proposed rates have become effective this Commission is powerless to suspend the effectiveness of, or otherwise modify, those rates under §205 of the Federal Power Act. Our only recourse is to institute a proceeding under §206(a) of the Act and after hearing determine just and reasonable rates to be thereafter observed and in force. For the reasons set forth below, I believe that:

(i) I & M's proposed rates became effective on July 13, 1972;

(ii) I & M in its application for rehearing provided us with the opportunity to avoid litigating this case while at the same time completely protecting the rights of its customers; and

(iii) The effect of the rejection of that opportunity by my colleagues will ultimately result in the sacrifice of customers' rights at customers' expense for the sake of what I conceive to be an illegal regulation.

My colleagues argue that the §35.13(b)(4)(i) of the Regulations is valid, that it has been reviewed and accepted with apparent approval in *Municipal Light Boards* v. *F.P.C.*, 450 F.2d 1341, 1354 (CADC 1971), cert. denied, 405 U.S. 989 (1972), and further that the interpretation placed by I & M upon §205(d) of the Act renders parts of the Act meaningless. I disagree on both counts.

In *Municipal Light Boards* v. *F.P.C.*, the issue presented to the court was whether the Commission could waive its regulations and permit rates to become effective on less than the required sixty-days notice. No party to the case took issue with the legality of the sixty-day rule, but rather assumed the validity of the rule and addressed their arguments to the question whether or not the question whether [*sic*] the Commission could validly waive its provisions. In this context, Judge Levanthal observed (at 1354) with respect to the sixty-day rule that it is "designed to enhance the ability of the FPC Staff to make the important threshold decision expeditiously upon the filing of the later statutory 30-day notice, as to whether to order an investigation and hearing or a suspension, or both." In my view, the quoted language from *Municipal Light Boards* is not authority for validity of the sixty-day regulation and uttered as it was in the context of an assumption of the validity of the rule does not even rise to the dignity of dicta on the issue before us.

On the second point (for the sake of brevity I will not again reproduce the language of §205(d) of the Act), I agree with the conclusion of my colleagues that "the provisions in the first sentence properly should be interpreted to permit the Commission in appropriate circumstances to

require the filing of requisite data more than 30 days prior to the proposed effective date." However, the reasoning by which one is forced from this conclusion to the companion conclusion (that I & M's construction of §205(d) of the Act gives the same meaning to two separate sentences of that section), is labored. The Commission may, under appropriate circumstances, require a notice period of more than thirty days. Two illustrations from our regulation of the interstate gas industry under identical provisions of the Natural Gas Act come to mind.

First, where there is a *quid pro quo* with the option left to the applicant to choose a 30-day notice period or a longer period with some added benefit to the applicant, there is no prohibition against the longer notice period. For example, our Regulations under the Natural Gas Act provide in pertinent part—

> §154.22 Notice requirement. All tariffs, and contracts or any parts thereof shall be filed with the Commission and posted not less than thirty days nor more than sixty days prior to the proposed effective date thereof. . . .
>
> And §154.63(c) (4). . . . *Provided, however,* that if the proposed rate increase is filed at least 45 days before the effective date proposed therefor and such filing does not comply with the requirements of this section, the natural gas company will be notified of the deficiencies, and if such deficiencies are properly cured within 15 days from the date of such notice, the requisite supplementary material will be deemed to have been filed as of the same date as the initial submittal of the proposed rate increase.

Under this latter provision, the applicant may (and usually does) trade 15 days of additional notice for the opportunity to avoid rejection of its filing for noncompliance with our regulations.

A second illustration of where more than 30 days notice may be imposed is where there is no conflict with a suspension period. Where suspension, if any, and the requisite notice will not prevent the placing of proposed rates into effect for a combined period of not more than six months, the provisions of the Federal Power Act and the Natural Gas Act are satisfied. Although the legislative histories of both Acts are inconclusive on the issue, a report accompanying an amendment to the Natural Gas Act in 1961 read:

> The Commission, with respect to domestic users of natural gas, may suspend the effective date of a new rate filing up to a period of five months, which, together with the 30-day notice period, means a 6-month suspension.

Furthermore, of the analagous section in the Natural Gas Act, the Supreme Court has said:

> It may readily be seen that these requirements [§§4(c) and (d) of the Natural Gas Act] are no more than are necessary to implement §§4(e) and 5(a): the filing requirements are obviously necessary to permit the Commission to exercise its review functions, and the requirement of 30-days advance notice of changes is essential to afford the Commission a reasonable period in which to determine whether to exercise its suspension powers under §4(e).
>
> It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake. . . . This concern was surely a proper one for Con-

> gress to take into account in framing its regulatory scheme for the natural gas industry. . . . , and we think that it do [*sic*] so. . . . by providing in §4 for the earliest effectuation of contractually authorized or othewise permissible rate review. . . . *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113-14 (1958).

The Court implied that the 30-day statutory period is to be used for the Commission review of rate filings and that a longer period would be incompatible with the filing utility's interest in the "earliest effectuation" of rate changes.

For the foregoing reasons, I dissent.

RUSH MOODY, JR.,
Commissioner

Text of Statutes Relied On

Federal Power Act §205, 16 U.S.C. §824d:

"Section 824d. Rates and charges; schedules; suspension of new rates

"(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

"(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regula-

tion, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate

account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

Federal Power Act §206(a); 16 U.S.C. 824e(a):

"Section 824e(a). Power of Commission to fix rates and charges; determination of cost of production or transmission

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

Federal Power Act §313; 16 U.S.C. 825*l*:

"Section 825*l*. Rehearings; court review of orders

"(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State,

municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

"(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of

the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

"(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."